

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN**

**VOLUNTARY FACILITATIVE MEDIATION
PROGRAM DESCRIPTION**

Definition Voluntary facilitative mediation is a "flexible, nonbinding dispute resolution process in which an impartial third party -- the mediator -- facilitates negotiations among the parties to help them reach settlement. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by going beyond the legal issues in controversy."¹ The mediator, who may meet jointly or separately with the parties, serves as a facilitator only and does not decide issues or make findings of fact.

Authorization W.D. Mich. LCivR 16.3

THE MEDIATORS

List of Mediators The Court has certified mediators who have received training sponsored by the Court, or its equivalent. The ADR Administrator maintains a current list of mediators.

Mediator Certification Fee Each mediator is assessed an initial fee of \$100.00 for certification, and thereafter, an annual fee of \$25.00 for re-certification. The monies are held by the Federal Bar Association in a separate, interest-bearing fund for training of mediators, court personnel, and judicial staff and for the education of the public and bar.

Mediator Qualifications To be considered for certification, an applicant must (1) be an attorney with a minimum of ten (10) years of federal practice experience, (2) be a member in good standing of this Court's bar, (3) have appeared as counsel of record or served as a facilitative mediator in at least five (5) cases over the past (5) years in this Court or another federal court, (4) have completed or agree to complete training approved by the Court and such additional training as required by the Court from time to time, (6) agree to pay the Court's mediator certification and annual recertification fees, and (7) agree to serve *pro bono* no more than once per year.

Certification of Mediators The panel is limited to fifty (50) certified mediators, or such other number as the Court may determine is appropriate from time to time to serve the needs of the program and provide sufficient experience for each mediator to maintain an adequate level of expertise. The panel of certified mediators is reviewed and reconstituted annually. Persons serving as mediators at the end of a calendar year retain their certified status unless removed from the panel under the next section. Before December 31 of each year, the ADR Administrator reviews the applications submitted by prospective mediators during that year and identifies those applicants satisfying the qualifications set forth above. The ADR Administrator selects by lot or other random means qualifying persons sufficient to fill all vacancies in the mediation panel. The panel so constituted by the ADR Administrator is the list of certified mediators for the next year unless modified by the Court.

¹ Judge's Deskbook on Court ADR, National ADR Institute for Federal Judges, Harvard Law School, November 12-13, 1993, p. 3.

Mediator Removal	The Court periodically establishes retention criterion, by specifying the minimum number of times that panel members must have been chosen to serve in VFM mediations in this Court during the previous calendar years. During the first week of December of each year, the ADR Administrator reviews the Court's records, identifies those mediators who have not fulfilled the Court's retention criterion and removes their names from the list of mediators for the next calendar year. A certified mediator is not subject to removal for failure to meet the retention criterion until the mediator has been a member of the panel for three (3) calendar years. A certified mediator who does not meet the retention criterion by reason of illness or other extraordinary cause outside the mediator's control may request in writing a waiver of this requirement. As mediators serve at the pleasure of the Court, the Court may remove a mediator from the certified list at any time for any reason.
Discretion of the Court	The Court retains discretion to waive or modify the criterion for qualification, certification or removal of any mediator in order to maintain the panel's balance in geography, practice area, or other demographic factor. Additionally, all decisions of the ADR Administrator concerning the qualification, certification or removal of a mediator or applicant are subject to review by the Court upon written application filed with the Chief Judge no later than ten (10) days after receipt of the decision under review. The Court may refer the matter to the Court's standing VFM advisory committee for recommendation.
VFM Advisory Committee	A standing VFM advisory committee is appointed by the Court from the following constituencies: certified mediators, attorney users of the VFM process, judicial officers and the Court's ADR Administrator. The committee may take into account comments solicited from client-users of the VFM process. The committee periodically reviews the VFM program and its effectiveness and makes recommendations to the Court on such issues as the qualification, certification and removal of mediators, the demographic balance of the panel, optimal size of the panel, mediator training, changes in policy or procedures, and requests for review by applicants or mediators.
Training	The Court sponsors periodic training sessions for new mediators, and refresher training for currently certified mediators. Certified mediators have completed at least 16 hours of training either sponsored or approved by the Court and served as a co-mediator in at least one case. The Court may also request mediators attend periodic refresher seminars sponsored by the Court.
<i>Pro Bono</i> Assignments	The Court may reasonably expect a mediator to serve in a <i>pro bono</i> capacity once each calendar year, pursuant to W.D. Mich. LCivR 16.2(h).
Disqualification Rules	No person serves as a mediator in any action in which any of the circumstances specified in 28 U.S.C. § 455 exist, or, in good faith, are believed to exist.
Immunity	Certified mediators are entitled to quasi-judicial immunity as officers of the Court.

CASE SELECTION

Eligible Cases	All civil cases except habeas corpus and social security cases are eligible for voluntary facilitative mediation.
Referral Method and Notice to Parties	In preparation for the initial Rule 16 scheduling conference, all parties are required to discuss the use of alternative dispute resolution and indicate their preference in the joint status report. If the district or magistrate judge is satisfied that the selection of facilitative mediation is <i>purely voluntary</i> and has the full approval of all parties, the judge incorporates that selection in the case management order with instructions to the parties to jointly select a mediator within 10 days.

THE MEDIATION PROCESS

Selection of Mediator	The parties jointly choose one mediator from the list of Court certified mediators within 10 calendar days of the issuance of the case management order. Plaintiff is responsible for notifying the ADR Administrator of the name of the selected mediator. If the parties are unable to reach agreement, they notify the ADR Administrator, who then selects a mediator for them. The ADR Administrator notifies the selected mediator, and requests a check for potential conflicts of interest. If a conflict is found to exist, the mediator notifies the ADR Administrator, who either selects an alternate mediator or requests the parties make a new selection. Once a mediator's selection is finalized, the ADR Administrator notifies the judge, who issues an order of referral for facilitative mediation.
Mediation Assessment	The Court assesses a fee of \$50 per referral of which \$25 is paid by the plaintiff(s) and \$25 is paid by the defendant(s). The monies are deposited into the Voluntary Facilitative Mediation Training Fund. In the instance of a <i>pro bono</i> mediation, the assessment is waived for any indigent party.
Fees	Mediators are paid their normal hourly rate, to be assessed in as many equal parts as there are represented parties. The mediator is responsible for billing counsel. In the event of noncompliance, the mediator may petition the district or magistrate judge for an order directing payment of his or her fees.
Timing for the Mediation Session	Within 14 days of the issuance of the order of referral, the mediator consults with the parties and sets a time and place for the mediation session. The initial session is held within 60 days of the order of referral. This section is not intended to impose any time limitations on the mediation process, but to encourage its prompt initiation. If the parties and the mediator agree, mediation may continue throughout the life of the case. The mediator sends a notice of hearing as soon as practicable to all parties and the ADR Administrator.
Timing and Nature of Submissions Required Before the Mediation Session	Not less than seven (7) calendar days before the initial mediation session, each party provides the mediator with a concise memorandum, no more than 10 double-spaced pages in length, setting forth the party's position concerning the issues to be resolved through mediation, including issues relative to both liability and damages. The mediator may circulate the parties' memoranda with the consent of all parties.
Duration of the Mediation Process	The format for the session is developed by the parties and the mediator. The developed format may involve one session or several sessions. The parties are free to continue with the process as long as they feel it is productive.

**Attendance at the
Mediation Session**

The *parties themselves* must attend the mediation session . A party other than a natural person (e.g., a corporation or association) satisfies this attendance requirement if it is represented at the session by a person (other than outside counsel) with ultimate authority to bind the party to terms of a settlement. A party that is a unit of government need not have present at the session the persons who would be required to approve a settlement before it could become final (e.g., the members of a city council or the chief executive of a major agency), but must send to the session an executive officer, in addition to counsel, knowledgeable about the facts of the case and the governmental unit's position. In cases involving insurance carriers, representatives of the insurance companies, with ultimate authority, must attend the mediation session. A party or lawyer will be excused from attending the mediation session only after a showing that attendance would impose an extraordinary or otherwise unjustifiable hardship.

**Status of Discovery
and Motions During
Mediation Process**

Any case referred to mediation continues to be subject to management by the judge to whom it is assigned. Unless otherwise ordered, parties are not precluded from filing pretrial motions or pursuing discovery.

**Mediation Logistics
and Location**

The mediator establishes the time and place of the mediation session(s). Mediations may take place at the mediator's office or at any other location the parties consent to. The mediator determines the length and timing of the sessions and the order in which issues are presented, and sends a notice of the agreed upon time and place to all participating parties.

**Filing of Mediation
Outcome**

At the conclusion of mediation, if settlement is reached, the mediator helps the parties draft a settlement agreement, along with a stipulation and proposed order to dismiss, which is then filed with the Court. If settlement is not reached, the parties have seven (7) calendar days to inform the mediator whether they desire to continue with the mediation process. Within 10 calendar days of the completion of mediation, the mediator files a brief report with the ADR Administrator, with copies to all parties. The report indicates only who participated in the mediation session, and whether settlement was reached, or in the event of no settlement, whether the process will be continuing. The ADR Administrator is responsible for keeping the Court informed of the status of the mediation process.

Confidentiality

All mediation proceedings are considered to be compromise negotiations within the meaning of Fed. R. Evid. 408.

COURT ADMINISTRATION OF THE MEDIATION PROGRAM

**Administrative
Structure**

The mediation program is administered by the clerk's office. Problems are initially handled by the ADR Administrator.

**Evaluation of the
Program**

The ADR Administrator gathers data relevant to a careful, in-depth analysis of the efficacy of the program, and reports to the Court on a regular basis. In an effort to gather information, the Court may develop questionnaires for participants, counsel and mediators, to be completed and returned at the close of the mediation process. Responses will be kept confidential and not divulged to the Court, the attorneys or the parties. Only aggregate information about the program will be reported.